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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NORMA L.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES et al.,

Real Parties in Interests.

B219993

(Los Angeles County
Super. Ct. No. CK63257)

ORIGINAL PROCEEDINGS. Petition for Writ of Mandate. Elizabeth Kim,
Juvenile Court Referee. Petition granted.

Joseph T. Tavano, under appointment by the Court of Appeal, for Petitioner.

No appearance for Respondent.

Children's Law Center for Los Angeles and Sophia Ali for Real Parties in Interest.

Norma L., the designated prospective adoptive parent of R.G., A.G., G.G. and D.G., seeks extraordinary writ relief (Welf. & Inst. Code, § 366.28;¹ Cal. Rules of Court, rule 8.456) from the juvenile court's order removing the children from her home. Although circumstances justified the emergency removal of the children, the juvenile court abused its discretion in determining the permanent removal of the children from Norma L.'s home was in their best interest without fully considering the changes that had occurred in the intervening two months. Accordingly, we direct the juvenile court to vacate its order removing R.G., A.G., G.G. and D.G. from Norma L.'s home and to conduct a new hearing pursuant to section 366.28, subdivision (n), to determine whether the children should be returned to Norma L.

FACTUAL AND PROCEDURAL BACKGROUND

Norma L. is the maternal great aunt of R.G. (born in March 2004), A.G. (born in June 2005), G.G. (born in May 2006) and D.G. (born in March 2007). R.G., A.G. and G.G. were initially detained shortly after G.G.'s birth when both G.G. and his mother, Tatiana L., tested positive for methamphetamine. The family had previously come to the attention of the Los Angeles County Department of Children and Family Services (Department) after Tatiana L. tested positive for methamphetamine at A.G.'s birth. Tatiana L. entered into a voluntary family maintenance agreement with the Department at that time but failed to comply with its terms.

The juvenile court sustained the Department's petition pursuant to section 300, subdivisions (b) and (j), finding that both Tatiana L. and the children's father, Gustavo G., had a history of substance abuse and were current abusers of illicit drugs, which rendered them incapable of providing the children with regular care and supervision and created a detrimental home environment. The court removed the children from the custody of their parents pursuant to section 361, subdivision (c)(1), and placed them with Norma L.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

A new section 300 petition was filed on behalf of D.G. following his birth with a positive toxicology screen for amphetamine. At the detention hearing the court ordered D.G. detained with Norma L., who had indicated she wished to adopt him and his three siblings. In June 2007 D.G. was declared a dependent child of the juvenile court and placed with Norma L.

A home study approved Norma L. to adopt all four children. Gustavo G. was in prison; Tatiana L. visited the children at Norma L.'s home (where Tatiana L. herself had lived for most of her childhood). Norma L. reported Tatiana L. was appropriate during those visits and stated she would allow Tatiana L. to continue to visit after she adopted the children. Norma L. was not married, but lived with Jimmy V., a man with whom she had a 20-year relationship.

Reunification services for Tatiana L. and Gustavo G. were terminated as to R.G., A.G. and G.G. in June 2007 and as to D.G. in November 2007. The section 366.26 hearing for selection and implementation of a permanent plan for the children was continued several times during 2008. In reports filed for those hearings, the Department consistently stated the children were very attached to Norma L. and she, in turn, was nurturing toward them and provided them with appropriate care and supervision. In August 2008 the court found by clear and convincing evidence the children were adoptable and terminated the parental rights of Tatiana L. and Gustavo G.

In its November 4, 2008 status review report the Department again stated Norma L. was providing the children with appropriate supervision and care: "The children appear to be well taken care of at the home of their Maternal Great Aunt Norma L[.] . . . Ms. L[.] has been observed to be very attentive to the needs of the children. She has been observed to be very loving and nurturing towards the children. The children appear very comfortable in her presence and are very attached to her." The report also indicated Norma L. planned to move to New Mexico once the adoptions were finalized "in order to provide the children with a safer and healthier environment."

The children's adoptive placement with Norma L. occurred on November 19, 2008. The Department's May 5, 2009 status review report stated a pro bono attorney was assisting Norma L. to file necessary paperwork for finalization of the adoptions, and the Department noted Norma L. was "eager for the adoption to be finalized."

In the early afternoon of May 22, 2009 Jimmy V. was killed inside Norma L.'s home by Gustavo G., who had recently been released from prison. (A social worker had apparently conducted a home visit very close to the time of the incident, but reported that she did not hear anything unusual or see anyone of concern in the home at the time.) According to a May 28, 2009 report to the juvenile court on the matter, on May 26, 2009 a detective from the Los Angeles Police Department informed a Department social worker that Gustavo V., Tatiana L. and Jimmy V. had been using methamphetamine in a back room of the home when Gustavo V. stabbed Jimmy V. (who is described in the report as Norma L.'s ex-boyfriend). The children were home at the time but did not witness the homicide. The detective also stated the address where the stabbing occurred was a "problem location."

The Department promptly removed the children from the home "due to the caregiver allowing the drug use in her home and fear of possible retaliation from the victim's family [and/or friends]." The notice of emergency removal stated Norma L. had allowed the drug use to take place inside her home, thus placing the children at risk of harm. The children were placed in foster care. The Department's report included a statement from Norma L. that she was "willing to do anything to have the children returned to her care." The Department recommended the court defer finalization of the adoptions to permit it to continue to investigate the matter and to determine whether the children could safely return to Norma L.'s home. Norma L., through counsel, filed a written objection to the children's removal.

In an interim review report dated June 8, 2009 the Department stated Norma L. had acknowledged knowing that Gustavo G. and Tatiana L. had drug problems, but insisted, if she had detected they were under the influence of drugs, she would not have

allowed them to visit the children. Norma L. also claimed she did not know Gustavo G. and Tatiana L. had lost their right to see the children. As to the identification of her home address as a high-activity location for law enforcement, Norma L. explained she had called the police on a number of occasions for help in compelling Gustavo G., and more recently Jimmy V., to leave the house. She also said Jimmy V., who had moved out of the home about one year earlier, had a long-term medical problem with a history of seizures and police and fire emergency personnel had been summoned to the home for assistance over the years. The Department reported the children said they wanted to return to Norma L. On June 4, 2009 the social worker received negative drug test results for Norma L. The court ordered an administrative review of the matter and directed the Department to facilitate monitored visits between Norma L. and the children.

On June 15, 2009 the Department reported Norma L. had moved to Alhambra by swapping residences with her sister Adrienne L. The Alhambra residence was clean and organized; no concerns were noted. Norma L. told the social worker she was anxious to have the children returned to her care because she understood they were not doing well emotionally. The social worker confirmed the children were doing poorly in their new placements, crying, not eating well and continually asking for Norma L. For her part, Norma L. had fully cooperated with the Department's safety plan, enrolling in drug awareness, counseling and parenting classes and participating in Al Anon meetings. The Department recommended the immediate return of all four children to Norma L., who had capably protected and nurtured them prior to the May 22, 2009 incident. However, the Department suggested finalization of the adoptions be delayed to provide necessary services and to permit the readjustment of the family after the tragedy.

Norma L. agreed not to go back to her former home if the children were returned to her and confirmed her understanding that no one under the influence of drugs or alcohol, no gang members and no drugs could ever be around the children.

At a hearing on June 15, 2009 the court found Norma L. to be the children's de facto parent and designated her as a prospective adoptive parent. At a further hearing on

June 17, 2009 the court received under seal the May 26, 2009 police report regarding the May 22, 2009 homicide; all counsel stipulated the court could review the report. The court also appointed a psychologist to conduct a bonding study between Norma L. and the children. Although visitation was briefly allowed on an unmonitored basis, the court subsequently modified that order; and Norma L.'s visitation with the children remained monitored. On June 24, 2009 Norma L. filed another objection to the children's removal.

In a July 20, 2009 report the Department again recommended the children be returned to Norma L. under adoptive placement status. The Department also recommended it provide family preservation services for at least six months to assess Norma L.'s parenting of the children and the children's safety. According to the Department, no adoption should be finalized until all necessary services were in place and it had been determined by the various agencies involved that it was in the best interest of the children to terminate court and Department supervision. In support of its recommendations, the Department reiterated Norma had fully cooperated since the removal of the children, acknowledged she had made mistakes that led to the events in her home on May 22, 2009 and had committed herself to their safe return. The Department also noted ongoing issues with the children's current placements.

At the hearing on July 27, 2009, notwithstanding the agreement among counsel for the Department, the children and Norma L. that the children should be returned to Norma L. under the conditions outlined in the Department's report, as well as the positive results of the bonding study previously ordered by the court, the court declined to order the children released to Norma L. Explaining its decision, the court stated, "The risk to the children is not limited to a neighborhood or to a dwelling structure . . . it extends into the family home and the actions that were permitted to take place in the home of Ms. L[.]" Relying on information in the May 26, 2009 police report, the court noted that Tatiana L, Gustavo G. and Jimmy V. had begun partying and smoking methamphetamine in the home the night before the stabbing; the partying continued into the following morning when an altercation occurred between Jimmy V. and Gustavo G. resulting in

blood dripping onto the floor; Norma L. directed the participants to clean up the mess, rather than ordering them out of the home; and the killing took place at some later point that day. In addition, the court said the information before it indicated people were residing in the home who were not supposed to be there, “includ[ing] a person who was a known drug user who was using methamphetamines for at least one year.”

On July 31, 2009 Norma L. filed an application for rehearing of the juvenile court referee’s July 27, 2009 order not to return R.G., A.G., G.G. and D.G. to her home. The application was denied on August 20, 2009.

Although not formally part of the record on appeal and not relevant to the question whether the juvenile court abused its discretion in overruling Norma L.’s objections to removal and declining to order their release to her on July 27, 2009, this court has been advised of the following developments in this case: After the July 27, 2009 hearing, Norma L. moved out of the Alhambra home and her sister Adrienne L. moved back into the home so the children could be placed with her. On November 25, 2009 the children were placed in the Alhambra home with Adrienne L. On February 1, 2010 the court allowed Norma L. to have unmonitored visits with the children upon verification of her completion of a parenting program and granted the Department discretion to allow Norma L. to move back into the Alhambra home on the condition she participate in individual counseling and an appropriate 12-step-type program (Al Anon or Alcoholics Anonymous). The children, however, remain placed with Adrienne L., not Norma L.

DISCUSSION

1. The Propriety of this Writ Proceeding; the Parties’ Positions on the Relief Requested

On July 30, 2009 Norma L., through her appointed dependency-court counsel, filed a notice of appeal from the juvenile court’s July 27, 2009 order not to return R.G., A.G., G.G. and D.G. to the home of their prospective adoptive parent (in effect, the

formal order to remove the children from Norma L.'s home).² A juvenile court order removing a dependent child from the home of a designated prospective adoptive parent after a hearing, however, is not appealable unless the prospective adoptive parent has first file a petition for extraordinary writ review that substantively addressed the specific issue to be raised on appeal and the petition was summarily denied or otherwise not decided on the merits. (§§ 366.26, subd. (n)(3), 366.28, subd. (b)(1); see Cal. Rules of Court, rules 8.454, 8.456.)

On November 2, 2009, following this court's appointment of appellate counsel for her, Norma L. filed a petition for extraordinary writ seeking review of the juvenile court's July 27, 2009 removal order and asked that we deem the July 30, 2009 notice of appeal to be a notice of intent to file a petition for extraordinary relief pursuant to rule 8.454(e) of the California Rules of Court.³ On November 6, 2009 we granted Norma L.'s request and deemed her notice of appeal to be a notice of intent to file a petition for extraordinary relief by writ and a request for the record. We also deemed the record in the appeal,

² The notice of appeal also purported to seek review of the juvenile court's July 20, 2009 order denying Norma L.'s motion to disqualify the juvenile court bench officer pursuant to Code of Civil Procedure section 170.1. That order is not appealable. The exclusive means for appellate review of a determination on the disqualification of a judge or other bench officer is by petition for writ of mandate in accordance with Code of Civil Procedure section 170.3, subdivision (d). (See *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1059.) In connection with the appointment of appellate counsel on September 24, 2009, this court advised Norma L. the denial of her disqualification motion was not appealable. Norma L. has not sought extraordinary writ review of the order.

³ Rule 8.454(e) of the California Rules of Court provides a party seeking writ review of a post-termination placement order under section 366.28, subdivision (b), must file a notice of intent to file a writ petition and request for record in the juvenile court within seven days after the date of the order or, if, as here, the order was made by a juvenile court referee, within seven days after the referee's order becomes final under California Rules of Court, rule 5.540(c). Norma L.'s writ petition avers neither a copy of the referee's July 27, 2009 order nor a copy of the order denying rehearing was mailed to her and thus asserts the July 27, 2009 order never became final under the applicable provisions of the California Rules of Court. (The notice of denial on rehearing, however, reflects that Norma L.'s appointed counsel was, in fact, served.)

together with the additional record provided in support of the petition, the record in support of the petition for extraordinary relief. (The appeal, no. B217952, has been subsumed in the writ proceeding, No. B219903.) On December 17, 2009 we issued an order to show cause why the relief prayed for in the petition—that we vacate the order removing the children from Norma L.’s home—should not be granted.

Counsel for R.G., A.G., G.G. and D.G., who supported the return of the children to Norma L. in the juvenile court, has filed a statement of support for Norma L.’s writ petition in this court and requests that this court grant the petition. Counsel for the Department, which also supported the return of the children to Norma L. in the juvenile court, has filed a statement that it does not plan to participate in the pending writ proceeding.

2. The Juvenile Court Abused Its Discretion in Failing To Fully Consider the Changed Circumstances Following the Emergency Removal of the Children

Section 366.26, subdivision (n)(4), authorizes the emergency removal, without advance notice, of a child residing in the home of a designated prospective adoptive parent due to an immediate risk of physical or emotional harm. (See Cal. Rules of Court, rule 5.728; *State Dept. of Social Services v. Superior Court* (2008) 162 Cal.App.4th 273, 285.) However, pursuant to section 366.26, subdivision (n)(3)(B), prior to a permanent change in placement of a child residing in the home of a designated prospective adoptive parent, the designated prospective adoptive parent must be given notice and an opportunity to object to the removal. If, as here, an objection has been filed, the juvenile court must holding a hearing and determine whether removal is in the child’s best interest: “[T]he child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child’s best interest.” (*Ibid.*; see Cal. Rules of Court, rule 5.727(g); *Wayne F. v. Superior Court* (2006) 145 Cal.App.4th 1331, 1334.) Section 366.26, subdivision (n)(3), “represents a paradigm shift in the standards to be applied to agency decisions in the narrow category of posttermination removal of children from designated prospective adoptive placements and gives to the court the wide discretion previously afforded the adoption agencies to

determine whether the placement is in the best interest of the child.” (*State Dept. of Social Services*, at p. 286.)

The concept of best interest in the dependency context has been described as “an elusive guideline that belies rigid definition.” (*Adoption of Michelle T.* (1975) 44 Cal.App.3d 699, 704.) “Its purpose is to maximize a child’s opportunity to develop into a stable, well-adjusted adult.” (*Ibid.*, accord, *State Dept. of Social Services v. Superior Court*, *supra*, 162 Cal.App.4th at p. 286.) Notwithstanding its vague contours, the Supreme Court has described “the goal of assuring stability and continuity” as a “primary consideration in determining the child’s best interest” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317) and has instructed, at a hearing to consider a change in placement, the court must consider the child’s current circumstances. (*Id.* at p. 322.)

We have no doubt—and Norma L. does not contest—the children’s situation as it existed on May 26, 2009 justified the Department’s decision to effect an emergency removal of R.G., A.G., G.G. and D.G. However, by July 27, 2009 circumstances had changed; and the juvenile court was obligated to consider events that had occurred since the children’s removal in determining their best interest. “[T]he court not only may, but should, consider both the facts that led to the emergency removal and evidence of the minor’s and the prospective adoptive parents’ circumstances up to and including the point in time when the court decides whether the removal should be made permanent. The juvenile court has the discretion to decide that the emergency removal was justified, but that circumstances at the time of the hearing are such that it is in the best interests of the minor to return to the prospective adoptive parents. Any other interpretation would ignore the plain legislative intent in enacting section 366.26, subdivision (n).” (*State Dept. of Social Services v. Superior Court*, *supra*, 162 Cal.App.4th at p. 287.)

The record before us indicates the juvenile court, relying heavily on the initial police report prepared shortly after Jimmy V.’s death (a document rife with hearsay), was properly concerned about the children’s safety in Norma L.’s home. By July 27, 2009, however, Norma L. had moved to a new home (her sister’s) in Alhambra; Jimmy V. was

dead; Gustavo G. was incarcerated; and Norma L. had vowed not to let Tatiana L. have access to the children. Norma L. had fully cooperated with the Department in obtaining additional skills through parenting classes and counseling and was participating in appropriate 12-step programs. It was also clear the children were strongly bonded to Norma L. (as the court-ordered bonding study, as well as the Department's social workers confirmed) and were encountering significant emotional difficulties in their new placements. Finally, the Department was not recommending the court return the children to Norma L. with a view toward immediate finalization of their adoptions, but rather to provide family preservation services for at least six months to further assess Norma L.'s parenting skills and the children's safety in her home.

Perhaps even considering all these circumstances, permanent removal of the children from the designated prospective adoptive parent would be appropriate. But by focusing exclusively (or, at the very least, primarily) on the events of May 22, 2009, and not evaluating the children's current circumstances in determining whether it was in their best interest to be removed from Norma L.'s home, the juvenile court abused its discretion.

DISPOSITION

Let a peremptory writ of mandate issue directing the juvenile court to vacate its orders overruling objections and removing R.G., A.G., G.G. and D.G. from the home of Norma L. and to conduct a new hearing in accordance with section 366.26, subdivision (n)(3), considering the children's and Norma L.'s current circumstances, to determine whether the children's permanent removal from Norma L.'s home is in the children's best interest.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.